

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBERLINE FOUR SEASONS
RESORT MANAGEMENT CO., INC.,
and LONG RUN REALTY, INC.

Petitioners Below, Appellants

v.


No.: 34151

PAT J. HERLAN, individually,
TIMBERLINE REALTY, INC, and
TIMBERLINE RESORT REALTY, INC.,

Respondents Below, Appellees.

APPELLANTS' BRIEF

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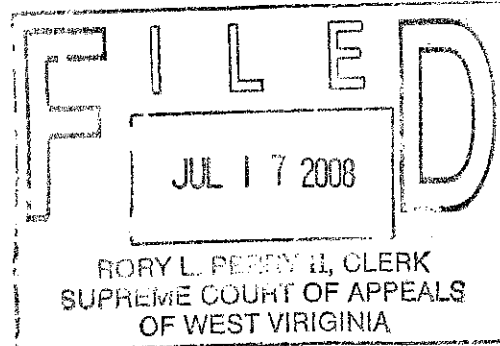


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PARTIES

Appellant, Timberline Four Seasons Resort Management Company, Inc. (hereinafter, "Timberline Four Seasons"), is a West Virginia Corporation doing business as a year round resort in Canaan Valley, Tucker County, West Virginia. Long Run Realty, Inc., a subsidiary of Timberline Four Seasons, is also a West Virginia Corporation.

Appellee, Pat J. Herlan, is a real estate broker in Canaan Valley, West Virginia. Timberline Resort Realty, Inc. and Timberline Realty, Inc. are West Virginia Corporations incorporated and run by Ms. Herlan.

PROCEDURAL HISTORY

On June 25, 2007 Petitioners filed their Petition for Injunctive Relief in the Circuit Court of Tucker County, West Virginia. On July 3, 2007 Respondents filed their Answer and the Circuit Court held a trial on the Petition for Injunctive Relief. Following the trial, proposed Findings of Fact and Conclusions of Law were submitted by the parties. On July 6, 2007 the Circuit Court of Tucker County entered its Findings of Fact and Conclusions of Law denying the Petition for Injunctive Relief. Petitioners filed a Motion for New Trial on July 18, 2007. That Motion was denied by the Court on July 31, 2007, whereupon the Appellant's herein filed a Petition for Appeal with this Court. On June 11, 2008 this Court undertook oral argument on the Petition. The Petition was granted.

FACTS

This case presents several novel issues in West Virginia. The interplay between agency and the West Virginia Real Estate Licensing Act and proprietary interests in telephone numbers are both at issue before the Court.

Timberline Four Seasons is a family owned four seasons resort (TR 4). Clientele from all over the country are attracted to Timberline Four Seasons every year (TR 12). The three families who own Timberline Four Seasons have invested approximately 20 million dollars over the past twenty years in an effort to improve the quality of the resort. Timberline Four Seasons runs much the way any large company does, it has divisions.

At issue in this case is the real estate division. The real estate division is one of the primary money making divisions of Timberline Four Seasons. Not only can it function year round, but it turns over significant dollar amounts every year in sales and rentals. Timberline Four Seasons cannot meet its loans without the real estate division (TR 28). Timberline Four Seasons cannot survive without the real estate division (TR 11).

Ms. Herlan was hired by Timberline Four Seasons in 1991, under a written employment contract (TR 5). In 1996 that contract expired, another written contract was never negotiated. However, Ms. Herlan stayed in her position performing the same functions as she did under the previous written contracts.

Some time in 2000 Ms. Herlan incorporated Timberline Resort Realty, Inc. and Timberline Realty, Inc. (TR 73). Ms. Herlan incorporated without prior notice to Timberline Four Seasons (TR 73). Until the incorporation of Timberline Realty, Inc. and Timberline Resort Realty, Inc., Ms. Herlan had used those names as d/b/a's, thus there was no noticeable change to the public upon her incorporation. During her time with Timberline Four Seasons, Ms. Herlan was paid a salary (TR 19). She received a W-2 (TR 6). In 2007 Timberline Four Seasons sent out 400,000 brochures which included the phone numbers taken by Ms. Herlan and at issue in this appeal (TR 97).

The function of the real estate division is two fold. First, it sells and promotes residential/subdivisions of the Timberline property. Second, it manages homeowner's property in the rental pool providing cleaning and upkeep services for profit.

Ms. Herlan's employment with Timberline Four Seasons continued until early 2007 whereupon she was asked to vacate the "Roundhouse."¹ Ms. Herlan vacated the Roundhouse on or about July 1, 2007 (TR 10).

Upon her departure, the business records were completely removed from the Roundhouse. Ms. Herlan did leave a list of approximately 6,000 names of customers (TR 31). It was undisputed that the list is largely useless (TR 31). Ms.

¹ The "Roundhouse" has been the real estate headquarters for Timberline Four Seasons and is the location where Ms. Herlan carried out her employment with Timberline Four Seasons.

Herlan stole all of the tangible records necessary to the operation of the real estate division (TR 30-31). Ms. Herlan also stole the information stored in the Property Plus software, this was accomplished by hiring a professional to move the information from the Roundhouse to Ms. Herlan's new location, and then deleting the information from the Roundhouse (TR 51). The cost of erasing and moving the data was approximately \$25,000.00 (TR 96).

In addition to the tangible and computerized records, Ms. Herlan had the phone numbers moved to her new location (TR 9). The computers, server, accounting records, and blank Property Plus software were all left at the Roundhouse (TR 30). There is no dispute that Timberline Four Seasons owns those items, which were utilized by Ms. Herlan throughout her employment with Timberline Four Seasons.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Tucker County Erred by Not Finding An Agency Relationship Between Timberline Four Seasons and Ms. Herlan or Ms. Herlan's Entities.
2. The Circuit Court Erred in Its Application of W.Va. Code §30-40-12
3. The Circuit Court Erred by Failing to Return the Phone Numbers to Timberline Four Seasons.

STANDARD OF REVIEW

The standard of review for challenges to Findings of Fact and Conclusions of Law by a Circuit Court is a two-pronged deferential standard. "The final order

and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). As shown below, the Circuit Court erred in its conclusion that Ms. Herlan was not an agent, such should be reviewed *de novo*. The Circuit Court further erred in its ultimate findings and disposition of the case.

ARGUMENT

The Circuit Court of Tucker County Erred by Not Finding An Agency Relationship Between Timberline Four Seasons and Ms. Herlan or Ms. Herlan's Entities

The relationship between Ms. Herlan and Timberline Four Seasons meets the test of agency. Agency arises when the following four elements are fulfilled:

(1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative."

Syl. Pt. 5 *Paxton v. Crabtree*, 184 W.Va. 237; 400 S.E.2d 245 (1990). This Brief and Appellant's argument will focus on the determinative factor of control. However, as a precursor, the relationship between Timberline Four Seasons and Ms. Herlan meets the first three elements of Agency under *Paxton*.

First, Ms. Herlan was selected and engaged by Timberline Four Seasons. She was hired under written contract in 1991. She continued under written contract until 1996, whereupon she remained in the same employment capacity until 2007. Ms. Herlan was selected and engaged. Second, Ms. Herlan was paid compensation. At trial there was no dispute that Ms. Herlan was paid for her services as a Real Estate Broker. Third, Timberline Four Seasons had the power of dismissal. It had the right to terminate Ms. Herlan, as it did in 2007.

The Circuit Court's error arises from not finding that Timberline Four Seasons had the power of control over Ms. Herlan². Control is determinative and essential. "One of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." Syl. Pt. 3, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994). Either through the relationship between Ms. Herlan and Timberline Four Seasons, or her own words and conduct, Timberline Four Seasons exercised control over Ms. Herlan sufficient to make her an agent.

At trial, the Circuit Court and Ms. Herlan both relied on the notion that the expiration of Ms. Herlan's written employment contract was germane. However, "[p]roof of an express contract of agency is not essential to the establishment of the relation. It may be inferred from facts and circumstances, including conduct." Syl.

² See paragraph 22 of the *Final Order*, "[t]he evidence shows that Timberline Resort Realty was not owned or controlled by Timberline Four Seasons Resort Management, Inc."

Pt. 2 *General Elec. Credit Corp. v. Fields*, 148 W.Va. 176, 181; 133 S.E.2d 780, 783 (1963). In fact, there is ample evidence arising from the relationship between Timberline Four Seasons and Ms. Herlan to find agency.

First, Timberline controlled the operating checking account for the real estate division. The general manager of Timberline Four Seasons, Tom Blanzky, testified at trial.

Q: Throughout the past sixteen years of Ms. Herlan's employment, did you have the opportunity to supervise the day-to-day functions of Timberline Resort Realty?

A: I conferred with Ms. Herlan on a fairly regular basis. I would go down to the real estate office maybe three or four times a month. I was a co-signature on the operating account for the operation and so I reviewed some of the expenditures and we talked over-- not in a formal way but-- some budget issues and things of that nature.

(TR 29-30). The fact that Timberline Four Seasons had control of the purse strings of the real estate division established that it exercised control over Ms. Herlan. Ms. Herlan also testified about the financial tie to Timberline Four Seasons.

Q: Okay. Who paid the taxes for Timberline Resort Realty?

A: All of the expenses for the operation were handled out of the operation of the --- the rental and sales operation. Any other funds were put into this joint account and we made sure all of the obligations of the realty office and the round house were paid. Then any profits from that was transferred to the resort and they paid taxes on it and that is the way it has been from the very beginning.

(TR 87-88). It is undisputed that Timberline Four Seasons exercised control over the finances and accounting of Ms. Herlan and Timberline Resort Realty, Inc.³.

Second, Timberline Four Seasons paid all of the taxes for the real estate operation. The President of Timberline Four Seasons, Dr. Reichle testified:

Q: Did Timberline Four Seasons pay the taxes for the Timberline Realty Operation?

A: Yes, all of the divisions of the resort culminate in a payment of the taxes as a whole.

(TR 6). Timberline Four Seasons exercised control over Ms. Herlan by commanding the finances and taxes of the real estate division.

Third, the employees who worked at the Roundhouse were not Ms. Herlan's employees; they were Timberline Four Seasons' employees. Dr. Reichle continued:

Q: And as to the employees in that office, whether it be Ms. Herlan or her assistants or any other employees that they might have had, did Timberline Four Seasons Resort Management [Company] Inc. also pay the taxes for those employees, withholding, W-2 and that sort of thing?

A: Yes that was submitted each year as a single tax form including all of the entities including the real estate division[.]

(TR 6). Timberline Four Seasons controlled the operating account, budget, taxes, and the employees of the real estate division.

³ In fact, Ms. Herlan left the accounting records in the Roundhouse.

Ms. Herlan's own testimony goes the farthest in explaining the degree of control that Timberline Four Seasons exercised over Ms. Herlan. Regarding Timberline Four Seasons' control of the taxes and operating account, Ms. Herlan testified:

That is an arrangement we had made with the resort way back when. I had wanted to have our own payroll within the office and the resort said they needed to do that because it was good for them to do and they could watch over and oversee what was happening in the real estate office. They were concerned that I would be taking a profit away from them.

(TR 82). Ms. Herlan's testimony that Timberline Four Seasons wanted to "watch over" and "oversee" her office is a definitive admission of control. Assuming, *arguendo*, that Ms. Herlan were independent of Timberline Four Seasons or that she was not its agent, she would not grant it the power to "oversee" her operation. She would insist on separation between its business and hers. In fact, the only conclusion to draw from Ms. Herlan's testimony is that she was under the control of Timberline Four Seasons.

In two distinct ways Ms. Herlan announced her affiliation and agency with Timberline Four Seasons. Ms. Herlan testified on cross examination:

Q: Okay. So would it be an unfair statement to say that you are a division of Timberline Four Seasons?

A: Yes, it is.

Q: Okay, When would [sic] have become an unfair statement to say?

A: Oh, Lord! It started back in the nineties.

Q: So as of the year 2000 it would have been an unfair statement to say that you are a division of or related to Timberline Four Seasons?

A: Definitely.

(TR 83-84). The veracity of Ms. Herlan's disclaimer was then immediately impeached. In 2005, Ms. Herlan signed a grant application under oath. Her sworn statement in that 2005 application reads as follows: "Timberline Resort Realty is a *vacation home rental arm* of Timberline Four Seasons Resort..." (TR 86)(Petitioner's Tr. Ex. 3)(emphasis supplied). This sworn statement came some five years after Ms. Herlan claims she split with Timberline Four Seasons.

After her impeachment on the grant application Ms. Herlan offered, "I don't know who wrote this, sir" (TR 86). The record bears out that Ms. Herlan signed the grant application, under oath, without reading it and without knowing who wrote it. Ms. Herlan's testimony was not credible.

Moreover, at the time of trial a sign still hung on the wall of the Timberline Four Seasons lodge stating, "Timberline Resort Realty *A division* of Timberline Four Seasons Resort." (emphasis supplied). Ms. Herlan testified that that sign had been in place for four or five years (TR 83). Ms. Herlan's testimony bore out inconsistencies and inaccuracies. She held herself out as an arm and a division of Timberline Four Seasons.

It is clear that Ms. Herlan's finances, payroll, accounting, taxes, and employees were all controlled by Timberline Four Seasons. It is also clear that the real estate operation did not operate independently from Timberline Four Seasons; rather it was treated as a division of Timberline Four Seasons. Timberline Four Seasons met and proved its control over Ms. Herlan below. It also met and proved Ms. Herlan was an agent of Timberline Four Seasons. The failure of the Circuit Court to find Agency was error.

At the crux of this appeal is the notion that Ms. Herlan, as an agent of Timberline Four Seasons, owed it a duty of loyalty. By virtue of her agency, Ms. Herlan could not engage in self-dealing. "In the conduct of his principal's business an agent is held to the utmost good faith, and will not be allowed to use his principal's property for his own advantage, or to derive secret profits or advantages to himself by reason of the relation of principal and agent existing between him and his principal." Syl. Pt. 1 of *Sutherland v. Guthrie*, 86 W.Va. 208, 103 S.E. 298, (1920)." Ms. Herlan did not act in the utmost good faith. She absconded with all of the records necessary to the operation of the real estate division, making certain that Timberline Four Seasons did not have those records.

Ms. Herlan violated her duty of loyalty to her principal. "As has been already seen, it is often said that the first duty of the agent is to be loyal to his trust." *Moore v. Turner*, 137 W.Va. 299, 316; 71 S.E.2d 342 (1952)(citing

Mechem on Agency 2d. §1588). From 1991 to 2007 Ms. Herlan was an agent of Timberline Four Seasons. Attendant to that agency is the duty of loyalty. Ms. Herlan's conduct as an agent must honor her duty to her principal. The business records and phone numbers are not rightfully hers. They were obtained pursuant to her agency; they were gained through the falsely placed trust of her principal. Ms. Herlan has used her position as an agent to defeat her principal. She has used her position as an agent to prosper. She breached her duty of loyalty.

The Circuit Court Erred in Its Application of W.Va. Code §30-40-12

Ms. Herlan argued below that the *West Virginia Real Estate License Act*, W.Va. Code §30-40-12 (2002), prohibited her from returning any of the business records taken from the Roundhouse. Ms. Herlan's reliance on §30-40-12 is misplaced for two reasons. First, Timberline Four Seasons hired a licensed realtor to take Ms. Herlan's place. Second, because Ms. Herlan was the agent of Timberline Four Seasons, she owed it its records.

W.Va. Code §30-40-12 (2002) (Qualifications for broker's license) sets out that

(b) No broker's license shall be issued in the name of a corporation, association or partnership except through one of its members or officers.

(c) No broker's license shall be issued in the name of a corporation, association or partnership unless each member or officer, who will engage in the real estate business, obtains a license as a real estate salesperson or associate broker.

Id. Ms. Herlan contends, by virtue of this code section, that she is not an agent of Timberline Four Seasons, that she owes it no duty, and that she cannot provide it with the business records, she claims to do so would be "illegal" (TR 68).

Timberline Four Seasons does not have a real estate broker's license, nor does any member of its board, this fact is undisputed. Nevertheless, it has utilized real estate brokers in the past as part of its business. At the time of trial, Timberline Four Seasons, via Long Run Realty, Inc., had already reached an agreement with another licensed real estate professional to replace Ms. Herlan. General Manager, Tom Blanzky, testified on cross examination:

Q: Has Long Run Realty Employed a broker?

A: We have an agreement with Kim Landis who is a broker in the valley.

Q: And what is that agreement, sir?

A: The agreement is to provide brokerage services for sales and rental.

(TR 45). In short, Ms. Herlan's contention that she could not divulge the business records is specious. Not only does W.Va. Code §30-40-12 not speak to who may possess records, but Timberline Four Seasons, through Long Run Realty, Inc., had already hired a replacement for Ms. Herlan. There is no merit to the argument that Ms. Herlan's license requires retention of the records when another licensed

individual has been hired to take her place. The Circuit Court erred in finding that W.Va. Code §30-40-12 prevented Ms. Herlan from returning the business records.

Moreover, as an agent of Timberline Four Seasons, Ms. Herlan could not deny Timberline access to the records. It bears repeating that Ms. Herlan not only copied the computer information, she then had it professionally erased. Ms. Herlan failed to cite any authority that a principal could not have access to an agent's records, with or without the implication of W.Va. Code §30-40-12. Ms. Herlan's wrongful retention of the business records was not justified in law. It can easily be inferred that she kept the records to her advantage and to the disadvantage of Timberline Four Seasons, Long Run Realty, Inc. and whoever her predecessor agent would be.

The Circuit Court Erred by Failing to
Return the Phone Numbers to Timberline Four Seasons

There is no dispute that Ms. Herlan registered the phones at the Roundhouse in her name (TR 62). She registered the phone numbers when she was hired in 1991. As a function of her employment and agency Ms. Herlan needed phones to carry out her operation of the real estate division. It is undisputed that at least one of the lines, 866-4777, was previously assigned to the Roundhouse but was disconnected when Ms. Herlan arrived (TR 88).

Appellant's argument with respect to the phone numbers is simple. Ms. Herlan utilized those numbers in performance of her agency, thus she cannot

derive an advantage therefrom. Timberline sent out 400,000 brochures last year alone promoting those telephone numbers. At the time Timberline Four Seasons did that, it was in control of the real estate division. Now, Ms. Herlan has those numbers and is presumably benefiting from the advertising of her former principal. Over the sixteen years of Ms. Herlan's tenure customers learned the subject telephone numbers were the way to contact Timberline Four Seasons' real estate division.

Counsel is aware of no precedent on point in West Virginia for this situation. However, it bears mention that regardless of how the number is registered, it is not prudent business to allow an employee to retain its telephone numbers upon termination of an employment relationship.⁴ The telephone numbers should be restored to Timberline Four Seasons because they were registered and utilized by Ms. Herlan as a function of her agency and employment.

Conclusion

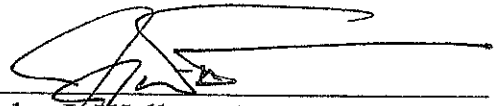
In many respects this case is novel. At the heart of it, is the basic premise that Ms. Herlan crippled Timberline Four Seasons' realty operation. She was its agent. Timberline Four Seasons had control over her accounting, her payroll, her taxes, her employees and, ultimately, her. She held herself out to be related to Timberline Four Seasons. She owes it a duty of loyalty. *The West Virginia Real*

⁴ The Circuit Court found Ms. Herlan was an employee of Timberline Four Seasons (see the Circuit Court's *Final Order* paragraph 25).

Estate License Act does not allow Ms. Herlan to steal, conceal and/or destroy the business records, especially when Timberline Four Seasons had already hired a replacement for Ms. Herlan.

WHEREFORE, Appellants request the decision of the Circuit Court of Tucker County be reversed. That an injunction be layed upon Ms. Herlan and her entities and the replevin of the records be ordered, in addition to any other remedies this Court deems just and equitable.

Timberline Four Seasons Resort
Management Co., Inc. and Long Run
Realty, Inc. - Appellants
by counsel,

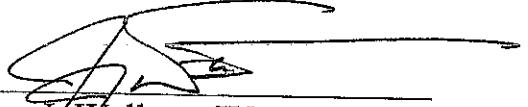


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CERTIFICATE OF SERVICE

I, John J. Wallace, IV, one of the counsel for Appellants, hereby certify that the foregoing Brief was served upon counsel of record on this 16th day of July, 2008 by depositing a true and correct copy thereof in the United States Mail in a postage paid envelope addressed as follows:

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